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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARCUS FOOD CO., Plaintiff and Appellant, v. PLA-ART INTERNATIONAL, INC., et al., Defendants and Respondents.	D052979 (Super. Ct. No. 37-2007-00066571-CU-CO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed.

The sole question here is whether a letter constitutes defendants' "acknowledgement" of an existing debt within the meaning of Code of Civil Procedure section 360,[1] thereby removing the bar of the statute of limitations on plaintiff's action for breach of contract and conversion. We answer the question in the negative and affirm a summary judgment for defendants.

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1 All statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

Marcus Food Co. (Marcus Food) is a Kansas company that sells commercial food products in California. PLA-art International, Inc., dba San Diego Cold Storage (Cold Storage) runs a warehouse for the storage of refrigerated food in the San Diego area, and in a May 2005 contract it agreed to store products for Marcus Food. Section 9 of the contract provides that Cold Storage shall not be liable for the loss of goods absent its failure to exercise due care. Section 9 also provides that if it is legally liable for the loss of goods, its liability is limited to the lesser of the actual replacement cost of the goods, the fair market value of the goods, 50 times the monthly storage charge for the goods, or $.50 per pound for the goods. Section 10 of the contract provides that no action may be maintained against Cold Storage pertaining to the goods unless it is brought within nine months of the time Marcus Food learned or reasonably should have learned of the loss.

Marcus Food prohibited Cold Storage from releasing any of its products without prior written authorization. On August 8, 2006, Mark Luterman, an employee of Marcus Food, telephoned Michael Jerde, an employee of Cold Storage, and complained that Cold Storage had released its products to a third party without its permission. Marcus Food requested an inventory of its products remaining in the warehouse, and the following day Cold Storage faxed Marcus Food the inventory. Marcus Food performed a reconciliation and calculated that more than 2,000 cases of food were missing.

On September 1, 2006, Marcus Food faxed a letter to Cold Storage demanding $124,132.77 to compensate it for the loss. The letter stated, "It is our understanding that your employee, Miguel, improperly released the missing inventory to Sergio Hernandez

without [a] written release," and "there is no proof as to where the product may have gone." On the same date, Frank Plant of Cold Storage sent Marcus Foods a letter that acknowledged receipt of the demand and stated, "Whether we agree or disagree on the reason for the loss, we have made the following calculations based on our limitation of liability in the event of loss or damage." The letter stated that under the contract terms, Marcus Food would not be entitled to its estimated fair market value of the missing goods, and rather, "our liability on this matter would be $51,094.07," based on multiplying $.50 per pound by the weight of the goods. The letter closed with, "If you have any further questions on this matter please feel free to contact me." According to Plant, he received no response.

On May 10, 2007, Marcus Foods filed a complaint against Cold Storage for breach of contract and conversion.[2] Cold Storage moved for summary judgment on statute of limitations grounds. It argued that by August 8, 2006, Marcus Foods knew or reasonably should have known of its cause of action, and the May 10 complaint did not fall within the contractual nine-month statute of limitations.

In its opposition to the motion, Marcus Food argued that under section 360, Plant's September 1, 2006 letter was an acknowledgement of an existing debt that began anew the limitations period. The trial court, however, found the letter "did not contain an admission of an existing debt for which [Cold Storage] was liable or willing to pay." The

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2 The complaint also named as defendants Michael Cuevas, a Cold Storage employee, and Sergio Hernandez, a salesperson allegedly engaged in business at Cold Storage. Hernandez is not involved in this appeal.

court determined the action accrued on August 8, 2006, and was time-barred. It granted Cold Storage's motion and entered judgment for it on March 24, 2008.

DISCUSSION

I

Standard of Review

A defendant is entitled to summary judgment if it establishes as a matter of law that the plaintiff cannot prevail on any of its causes of action. The "defendant must present facts to negate an essential element or to establish a defense." (*American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 35.) We review summary judgment rulings de novo. (*Ibid.*)

II

Section 360

"The statutory rule in respect to the tolling of the statute by a subsequent writing provides: 'No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title [statutes of limitations], unless the same is contained in some writing, signed by the party to be charged thereby.' " (*Western Coal & Mining Co. v. Jones* (1946) 27 Cal.2d 819, 822 (*Western Coal*), citing § 360.) "[T]he acknowledgment and promise are stated in the alternative, thus indicating that either one or the other will be sufficient to toll the statute." (*Western Coal, supra,* at p. 822.)

Marcus Food contends Plant's September 1, 2006 letter was an "acknowledgment" of an existing debt within the meaning of section 360. "The acknowledgment of a debt

before the statute has run does not create a new obligation but merely continues the old obligation through a new statutory period." (*Kaichen's Metal Mart, Inc. v. Ferro Cast Co.* (1995) 33 Cal.App.4th 8, 15.)

"The ordinary meaning of acknowledgment is an admission or recognition of the existence of the debt." (*Western Coal, supra,* 27 Cal.2d at p. 822.) "There must be a clear and definite acknowledgment of the debt." (*Outwaters v. Brownlee* (1913) 22 Cal.App. 535, 539.) " 'The distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same; from such an acknowledgment the law implies a promise to pay.' " (*Ibid.*)

Plant's September 1, 2006 letter provides, "*Whether we agree or disagree on the reason for the loss,* we have made the following calculations based on our limitation of liability in the event of loss or damage." (Italics added.) We agree with the trial court that the letter is not an unqualified admission of an existing debt. Rather, it indicates a disagreement, or at the least a potential disagreement, between the parties pertaining to Cold Storage's responsibility, and states that "[b]ased on [Cold Storage's] calculations our liability on this matter *would be* $51,892.27." (Italics added.) The letter merely disputes Marcus Food's claimed damages as not comporting with the contract terms in the event of a loss for which Cold Storage has liability. Marcus Food could not reasonably believe the letter was an acknowledgment of Cold Storage's liability.

Marcus Food's reliance on *Buescher v. Lastar* (1976) 61 Cal.App.3d 73 (*Buescher*), is misplaced. In *Buescher*, the plaintiff recovered on a demand note the defendant signed despite the expiration of the statute of limitations. The court found that several writings the defendant made constituted acknowledgements of the debt within the meaning of section 360 and thus extended the limitations period. The defendant wrote, " 'about repaying the loan. Well at this time it is impossible.' " (*Id.* at p. 75.) He also wrote, " 'In prior letters I told you financially I am down. Well I went to a few places and they request a copy of the note. I can't do anything without it so you could send a copy we will see what can be worked out.' " (*Id.* at p. 76.) Further, he wrote, " 'In regards to money, I just don't have any. . . . If you feel you must take the matter up with an attorney this would be entirely up to you, but as far as I can see you would have very little to gain since we have very little.' " (*Ibid.*) The court explained the "facts at bench constituted an unequivocal acknowledgment of the debt evidenced by the note; no new terms or conditions were requested or suggested by [the defendant]. The most that can be said for [the defendant's] position is that he advised [the plaintiff] that legal action would not result in full collection." (*Id.* at p. 76.)

Marcus Food asserts this case is akin to *Buescher* because "Plant's acknowledgment of the debt suggests no new conditions or qualifications." Plant's letter, however, does not contain the types of statements present in *Buescher.* Since the letter is not an unqualified acknowledgment under section 360 it is immaterial that the letter did not propose any new contract terms.

Similarly, *First National Bank of Park Rapids v. Pray* (1927) 86 Cal.App. 484 (*Pray*), is unhelpful. *Pray* was an action on a promissory note, in which the court held the following writing was an acknowledgment under section 360: " 'Please understand I have no desire to postpone or delay payment or to feign or simulate or frame up any defense to these notes, but I think that the amount you receive from the principal debtor or maker of the note should be first applied thereon before I as guarantor make any settlement.' " (*Pray, supra,* at p. 492.) Marcus Food submits that since the writing was made in response to a settlement demand, *Pray* is applicable here since Plant's letter also followed a settlement demand. Plant's letter, however, made no similar statement and does not constitute an unqualified acknowledgment.

We are also unpersuaded by Marcus Food's assertion that in deposition Plant confirmed his letter was an acknowledgment of debt. Marcus Foods isolates Plant's testimony, "Well, it would be a response of our liability based on our terms and conditions. . . . " Marcus Food omits the portion of Plant's response that shows his letter was intended to dispute Cold Storage's liability. Plant's full answer was:

> "Well, it would be a response of our liability based on our terms and conditions, which is what I – when I spoke with Keith [from Marcus Foods] and Mark, . . . I explained to them that there were a couple of issues. The primary one was that their claim was based on product being missing or damaged. And based on their conversations with ourselves and the information we were getting from Sergio . . . , the product was not missing or damaged. It had been received by their client and their client was making arrangements to make good on that."

Further, during Plant's deposition Marcus Food's counsel essentially conceded Plant's letter was not an unqualified acknowledgment of an existing debt. Counsel asked

Plant, "When you indicate [in your letter] *a disagreement as to the reason for the loss*, can you tell me what the disagreement was?" (Italics added.) Plant responded, "I think the disagreement is whether there was a loss or not." To any extent Plant's deposition testimony is relevant to the section 360 issue, as Marcus Food asserts, it is antithetical to Marcus Food's position. Further, contrary to Marcus Food's assertion, Plant's letter does not "expressly state[] that, *regardless of fault*, our liability on this matter would be $51,094.07."

DISPOSITION

The judgment is affirmed. Cold Storage is entitled to costs on appeal.

MCCONNELL, P. J.

WE CONCUR:

AARON, J.

IRION, J.